LIST OF CASES AND AUTHORITIES

INDEX OF SUBJECT MATTER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1920.

CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY, Petitioners, vs. DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL and F. C. HUBBELL, and F. M. HUBBELL & SON, Respondents.	No. 66
DES MOINES UNION RAILWAY COMPANY, F. M. HUBBELL, F. C. HUBBELL and F. M. HUBBELL & SON, Petitioners, vs. CHICAGO, MILWAUKEE & ST. PAUL RAILWAY COMPANY and WABASH RAILWAY COMPANY, Respondents.	No. 67

PETITION FOR REHEARING.

Come now the Des Moines Union Railway Company, F. M. Hubbell, F. C. Hubbell and F. M. Hubbell and Son, Respondents in Case No. 66 and Petitioners

in Case No. 67, and hereby petition the court to set aside the judgment and decree heretofore entered in these cases and to grant a rehearing thereof and in support of their petition respectfully say:

We are led to present this petition for rehearing because the decree authorized by the opinion of this court will result in a most grievous injustice to the defendants. It gives to one party—the Milwaukee Company—a one-half interest in a valuable property, for which, concededly, it never paid a dollar and never thought it was buying. It gives to another party—the Wabash Company — an interest which it sold many years ago at what was then its full value. This property is taken from persons who not only acquired it with the full knowledge of everybody interested, but made it valuable by devoting their full business life to its care and development. Such a decree can only be justified by the best of reasons. It is therefore with the utmost respect, but with the utmost assurance of the justice of our cause, that we ask a re-examination of this record.

The district court and circuit court of appeals having concluded that complainants were estopped by their conduct and laches, found it unnecessary to determine the primary and fundamental question of whether, by reason of the transactions leading up to the transfer of the property to the Terminal Company, it took an absolute title to the terminal property or simply the legal title in trust for complainants' predecessors. We therefore desire to devote our energies to persuading the court that it has fallen into a serious error in determin-

ing this fundamental proposition in favor of complainants.

In this discussion we will designate complainants and their predecessors the "Railway Companies" and the defendant corporation the "Terminal Company."

THE OPINION OF THE COURT.

A careful analysis of the opinion will, we hope to convince the court, disclose elements which if given due consideration must result in its own destruction.

For this purpose we must inquire into the evidence upon which the court bases its conclusion that it was intended to form a trust. Where, and what is it?

It is probably not fair to the court to assume that the opinion contains a reference to all the facts upon which reliance is placed to support its conclusion, but we think it is fair and must be true that the incidents referred to constitute the outstanding and most persuasive facts contained in the record.

It is unnecessary, of course, to discuss the contract of 1882 in this connection, because, concededly, under that contract the Railway Companies were the absolute owners of and had absolute dominion over the property in controversy. They could make any disposition of it they saw fit. They could have vested the title in the Terminal Company in trust or in fee.

The incident referred to in the opinion primarily in point of time and importance is the language contained in article two of the original articles of the Terminal Company, reading as follows:

> "All the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract (contract of 1882)." (Vol. 11, p. 420).

It is this language, the court says, which "amounts to a declaration of trust."

This language does not necessarily amount to a "declaration of trust." It is at best ambiguous. It is not the language one would expect competent lawyers and business men to use for that purpose. That this is so is recognized by the court when it found it necessary to explain, in connection therewith, other items of evidence found in the record, such as the provision in article three authorizing the Terminal Company to acquire the terminal property "in payment" for its stock and "the absolute form of the conveyances."

With respect to these matters the court further says:

> "The absolute form of the conveyances, and the issuance of stock and bonds 'in payment,' were intended to give credit to the company in its dealings with outside parties and to render its bonds more readily salable; but they constituted the mere mechanism for carrying into effect the main purpose of the parties, and as between them were controlled by that purpose and by the articles and resolutions that manifested an express declaration of the trust."

For the moment we may leave out of consideration the resolutions, because "outside parties" were not charged with notice of them.

If this language means anything, it means that "outside parties" in dealing with the Terminal Company and its property were justified in concluding from an examination of the articles of incorporation and the deeds that no trust existed, and that the Terminal Company owned the property.

"Outside parties" were charged with knowledge of the following:

1. The contract of 1882.

2. That article two contained the following language:

> "All the powers exercised by this Company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2d day of January, A. D. 1882." (Vol. II, p. 420).

3. That the Terminal Company had the right to lease or otherwise dispose of the use of any part of its franchise to any other railway company, provided the Railway Companies assented in writing.

4. That the corporation was authorized to issue its capital stock "in payment" of the terminal property.

5. The method adopted by article four for nominating and electing directors.

6. That no contract, lease or other agreement amounting to a permanent charge upon the property should be executed without the approval of the Railway Companies and the approval of three-fourths of the stockholders of the Terminal Company expressed at a stockholders' meeting.

7. The deeds transferring the property were absolute in form.

All of these were public records of which every person dealing with the corporation was required to take notice.

The court says that it was "intended" by the parties to so formulate these proceedings as "to give credit to the company in its dealings with outside parties and to render its bonds more readily salable." "Outside parties" knew all the provisions of the contract of 1882, because it was a part of the articles; they knew of the provision of article two, heretofore quoted, because it was a part of the articles; they knew of the

limitations on the power of alienation for they were part of the articles; they knew of the method of control of corporate affairs, because it was contained in the articles. Likewise they knew that the corporation was organized with power to own the property, and was authorized to issue its stock in "payment" therefor, as well as the absolute character of the conveyances, because they were all parts of a public record.

Manifestly it is impossible to say that they formulated a part of these proceedings for the purpose of expressing the intent that the Terminal Company should own the property, and another part to express a trust. Manifestly it is impossible to say that all of them taken together were intended to express a good and complete title and at the same time express a trust.

Manifestly, also, if the use of the language quoted from article two is assumed "to amount to a declaration of trust," then the explanation of the Court of the provision for the issuance of the stock in "payment" and of the absolute form of the deeds, does not explain since no force or effect is allowed to these facts. The failure to give consideration to these cogent circumstances we submit is an adequate reason for a reconsideration of the case.

Right here let us refer to another error the court has made in explaining the form of these deeds. It says:

> "But if, as here, the subject of the trust be a legal interest in property and capable of legal transmutation, the trust is not perfectly created unless the legal interest be actually vested in the trustee. *Adams v. Adams*, 21 Wall. 185, 192, 194. Hence the necessity in this case of deeds conveying the fee to the terminal company."

The *Adams* case does not sustain this conclusion. What was there held was that it was necessary to convey the legal title. What was here done was to convey the fee—the ownership. The form of the deeds can not be explained by saying it was necessary to convey the legal title.

It is fundamental in the law of trusts in real estate that the title is in one and the ownership in another. Justice Story defines it as:

> "an equitable right, title or interest in property, real or personal, distinct from the legal ownership thereof."

2 Story, Equity Jurisprudence, ¶964.

It was not necessary, in order to perfectly create the trust, that these deeds should have been absolute in form.

It is manifest, therefore, that a trust can not be inferred from the provisions of the articles (including the contract of 1882) and the deeds, because to do so would defeat the intended purpose of giving the corporation credit in its dealing with "outside parties" by reason of its apparent ownership of the property.

Of course, it does not necessarily follow from this that a trust was not intended. But it does necessarily follow that evidence of the trust must be found in some records outside of the contract of 1882, the articles and the deeds. To these records we will now give attention.

In support of the trust theory the court refers to the resolutions of the Railway Companies. One of the resolutions passed by the Railway Companies, after reciting the fact of the execution of the contract of 1882

and the subsequent organization of the Terminal Company, reads as follows:

> "Resolved, That this Company accepts and ratifies so far as its interests are affected thereby, the Articles of Incorporation of the Des Moines Union Railway Company as in substantial accord and compliance with the terms and conditions of the said contract of January 2, 1882, and undertakes to discharge all the obligations imposed upon it by said contract in order to make effective the purposes of said Des Moines Union Railway Company." (Vol. II, p. 424.)

Do these recitations and resolutions tend to establish a trust? Would they have put "outside parties" who were expected to extend credit upon the theory that the Terminal Company owned the property, on inquiry with reference to the trust had they learned of them? They simply recited the fact of the contract of 1882 and the corporate organization, facts which outside parties were bound in law to know. The resolution simply ratifies the corporate organization and pledges the Railway Companies to discharge their obligations in order to make effective the purposes of the corporation, one of which was to secure credit from "outside parties" on the strength of the ownership.

This resolution is followed by another:

> "Resolved: That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled, under said contract to convey, assign and transfer to said Company all its right, title and interest of whatever name and character, in and to the real estate, franchises, choses in action, and rights in possession or contingent to all the property in the City of Des Moines east of Farnham street in said city, now held, enjoyed or

> claimed by either or all of the signatories of said contract of January 2, 1882, or any agent or trustee thereof purchased, acquired, or held in pursuance of said contract." (Vol. II, p. 424.)

There is nothing in this resolution suggesting a trust. It authorizes the transfer of ownership in the most specific language. It authorizes the transfer of every possible interest in the property.

The remaining resolution passed at this time was as follows:

> "Resolved, That the proper officers of the Company be authorized to transfer the management and operation of its property in Des Moines, so far as the same may now be vested in the Company to the Des Moines Union Railway Company on the 1st day of January, 1885, or as soon thereafter as practicable, leaving the question of settlement between this company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein, and the same being duly considered was adopted by the meeting, all the stock present and represented, voting therefor." (Vol. II, p. 427.)

This resolution, instead of tending to express a trust, emphasizes the thought that it was designed to convey the ownership. Management and operation of the property were to be transferred to the Terminal Company as soon as practicable, the matter of settling the terms and method of payment for the property, not the trust, conveyed to be settled later.

The resolutions passed by the Terminal Company at this time are of like character in every respect, and we need not set them out or comment on them. There is, therefore, nothing in the resolutions of 1885 tending to express a trust.

This brings us to the resolutions of 1887. These resolutions, in so far as they authorize How and Dodge to transfer, are not significant except as they require evidence of promises to pay as conditions precedent. Otherwise they are just such resolutions as would be expected whether it was intended to establish a trust or otherwise.

The only resolution other than these was that of the Des Moines & St. Louis Company, as follows:

> "Resolved, That the president and secretary of this company be and they are hereby authorized and directed to execute to the Des Moines Union Railway Company a deed conveying to it all its real estate rights of way, franchise, roadbed and other property of said company lying and being in the City of Des Moines, east of Farnham street, whether the same was acquired by grant from City of Des Moines or by purchase or condemnation, this resolution being offered for the purpose of carrying out the contract of date January second, 1882, entered into by and between this company, the Des Moines North Western Railway Company, the St. Louis, Des Moines and Northern Railway Company and others." (Vol. II, p. 439.)

This is the only resolution which can be said to be so much as ambiguous. And there is no ambiguity in it, unless we ignore the provision for the transfer of the property and what the parties did pursuant thereto.

Manifestly they did not intend to carry out the contract in accordance with all its terms. Many of its provisions could not then be carried out. The primary purpose was to provide terminal facilities which they might use in connection with their lines of railway. The means of doing this might be and were several times changed.

We contend that what they had in their minds in using this language was this primary purpose. This is demonstrated by what they did under and immediately following this resolution, to which we will later refer.

The deeds of conveyance do not contain anything tending to establish a trust. This is conceded by the court in its attempt to explain them.

We are therefore necessarily driven back to the articles themselves for any evidence there may be of the establishment of a trust.

Considering the articles, the court says that the parties put into article two the provision that the powers exercised by the corporation should be in accordance with the terms and spirit of the contract of 1882 for the purpose of declaring a trust, and then put into article three a provision that the corporation should receive the terminal property "in payment" of its stock for the purpose of making it appear to "outside parties" that it owned the property and that this latter purpose was emphasized by the form of the deeds.

This manifest inconsistency is a sufficient ground to require, in justice to defendants, a re-examination of this record. This is so because the defendants are entitled to the judgment of this court based upon a proper appreciation of the purposes of the transactions upon which that judgment is based, and manifestly this they have not had.

This brings us to a consideration of the record which may properly be urged in support of defendants' theory, and first

THE ARTICLES OF INCORPORATION.

Of these it is to be said that they are not skillfully drawn. The author of them either did not have clearly in mind the purpose to be accomplished or was unhappy in his choice of method and language in expressing himself. There are some features, however, which are beyond dispute. Manifestly the corporation acquired the power to own a terminal property and operate it for its own profit and that of its stockholders. Manifestly, also, it assumed the power to acquire the ownership of the terminal property in question and pay therefor by issuing its stock. We think it is also manifest that the Railway Companies did not, by the organization of this corporation and transferring to it the terminal property, intend to lose control of that property. They simply intended to change the plan of control. Theretofore they had controlled it because they owned it and had physical possession of it. By this new plan they intended to control it through their stock ownership. This new plan was perfectly feasible. The fact that they later parted with some of the stock for a valuable consideration does not warrant a rescission of the whole transaction but on the contrary emphasizes the argument that they took this stock in exchange for their original direct beneficial interest in the Terminal property.

In considering the articles it is important to note that the power to be the recipient of a trust is not expressly assumed. Such power, if it existed, must be found included in its general powers, or inferred by construction. The language in section two from which the court infers this power and intent is at best ambiguous. In and of itself is it not sufficient to estab-

lish a trust. This the court recognizes when it resorts to other facts and circumstances for the purpose of interpretation. The effect of this language must depend upon other facts and circumstances.

In article three is contained the provision authorizing the corporation to issue its stock "in payment" for the terminal property. The natural import of this language is to express an intent that the corporation should acquire the ownership. This the court recognizes by attempting to explain it upon the theory that it was intended to give third parties assurances contrary to the facts. This explanation is, as we have demonstrated, an obvious error.

In sections two and four are contained provisions restricting the power of alienation and regulating the method by which the Railway Companies should control the corporation through their stock ownership. These provisions, the court says, "were intended not as a substitute for, but as safeguards of, the trust." With this conclusion we take issue. If the Terminal Company simply took the title to this property in trust, it had no power of alienation and therefore there was no necessity for a restriction thereon. Those restrictions were only useful or necessary if the corporation owned the property.

We wish, however, to emphasize the fact that under the Iowa statute these articles were, like the deeds, public records of which "outside parties" were required to take notice.

(*Dempster Mfg. Co. vs. Downs*, 126 Iowa, 80.)

The question we have is, what was the character of the title acquired by the Terminal Company as a result of the transactions culminating in the transfer to it—was it an absolute title or simply in trust? The

question is one of intent. Did the Railway Companies intend that the Terminal Company should have an absolute title—the ownership—of this property, or simply its legal title in trust?

How are we to determine this intent? Strictly speaking, of course, a corporation can have no intent. It has neither mind, body nor soul—it can act only through its authorized representatives. The intent of the authorized agents of these Railway Companies, therefore, was the intent of the Companies themselves. To solve the question, then, we must inquire into the intent with which these persons acted.

Who were they? They were Col. Wells H. Blodgett, general solicitor of the Wabash Railroad Company, and a director in its subsidiary, the Des Moines & St. Louis Company; James F. How, vice-president of the Wabash Railroad Company, and president and director of the Des Moines & St. Louis Railroad Company; James F. Joy, a member of the Purchasing Committee and president of the Wabash Railroad Company; O. D. Ashley, a member of the Purchasing Committee, a director and afterward president of the Wabash Railroad Company; Edgar T. Welles and Thomas H. Hubbard, members of the Purchasing Committee and directors of the Wabash Railroad Company; G. M. Dodge, president and principal owner of the St. Louis, Des Moines & Northern Railway Company, and, to a lesser degree, C. M. Hays, general manager of the Wabash Company.

Unfortunately, all of these men, except Blodgett and Hays, passed from their earthly labors before the trial of this case, or at least we find in the record only the testimony of these two persons, so, as to all except

Blodgett and Hays, we must ascertain their intent entirely by the record they left of their actions.

Colonel Blodgett was and had been for years general solicitor of the Wabash Company and continued to occupy this or a similar position up until long after the commencement of this suit. At the time his testimony was taken he was one of counsel in this case. He assisted in conducting this litigation during its earlier years. He it was upon whom reliance was placed to guide the affairs of the Wabash Company. In him was reposed the confidence of the responsible managing officers and directors of the company. He knew their intent. It was his duty to formulate the proceedings to carry out their intent. He knew what was intended by the transactions which culminated in the transfer of the title of this property to the Terminal Company. He and counsel who examined him at the time his testimony was taken in this case knew that the vital question was that intent, but they carefully avoid putting that question to him. Nowhere in Colonel Blodgett's testimony can be found a reference to the intent with which these transactions were conducted. Colonel Blodgett's oral testimony, then, is not enlightening on the subject, except that it is significant that he is not examined with respect to it. It was competent for Colonel Blodgett to testify directly as to the intent with which these transactions were consummated.

Mr. Hays' testimony on this subject was equally unenlightening. He did not occupy a position of responsibility in the Wabash organization until the latter part of 1887, and, according to his testimony, had no recollection with reference to the details of the transactions nor of the purposes for which they were had.

We are therefore compelled to rely entirely upon the written record made by these gentlemen, which, however, is not subject to the infirmities necessarily inherent in oral testimony, especially as to transactions long past.

THE RESOLUTIONS OF 1885.

To correctly weigh the evidence contained in these resolutions and other material documents, it is important to keep in mind the situation as it then existed. At this time, under the contract of 1882, the Des Moines & St. Louis Railroad Company was the absolute owner of one-half, and the other two railway companies each the owner of a one-fourth, interest in the various items of property making up the terminal, the record title of which stood partly in the name of the Des Moines & St. Louis Company, partly in the name of the St. Louis, Des Moines & Northern Company, and partly in the name of Dodge and How, as trustees. It was competent for the Railway Companies to vest in the Terminal Company the legal title in trust, reserving the beneficial ownership to themselves, or to vest the ownership in the Terminal Company, taking to themselves simply the evidences of indebtedness and the capital stock.

Upon the completion of the organization of the Terminal Company, the Des Moines & St. Louis Company (the subsidiary of the Wabash, which had furnished the bulk of the money), under date of January 1, 1885, passed the following resolution:

> "Resolved, That the proper officers of this Company be authorized upon the issuance to it of the share of the bonds and stock of said Des Moines Union Railway Company to which it may be entitled under said contract to convey, assign,

and transfer to said company all its *right title and interest* of whatever name and character, in and to the real estate, franchise, choses in action, and rights in possession or contingent to all the property in the City of Des Moines, east of Farnham street in said city, now held, enjoyed or claimed by either or all of the signatories of said contract of January 2nd, 1882, or any agent or trustee thereof, purchased, acquired or held in pursuance of said contract." (Vol. II, p. 431.)

This resolution was probably prepared by Colonel Blodgett—at least, he was present at the meeting and voted for it, and therefore approved the form. There is nothing ambiguous about it. It authorized the following things:

1. A transfer by the Des Moines & St. Louis Company of the property which stood in its name.

2. A transfer by the Des Moines & St. Louis Company of its beneficial interest in the property which stood in the name of How and Dodge, trustees.

3. A transfer by the Des Moines & St. Louis Company of its beneficial interest in the property which stood in the name of the St. Louis, Des Moines & Northern Company.

4. A transfer by the Des Moines & St. Louis Company of "all its right title and interest of whatever name and character," in any of this property.

5. A transfer by the Des Moines & St. Louis Company of its "franchises, choses in action, and rights in possession or contingent" in all the property held by any of the parties to the contract of 1882, or any agent or trustee thereof, acquired or held in pursuance thereof.

There was no possible interest, beneficial or otherwise, which the Des Moines & St. Louis Company had in this property that was not authorized to be transferred by this resolution.

The court in its opinion says, in effect, that this resolution doesn't mean what it says; that what it means is that there should be vested in the Terminal Company simply the legal title in trust, reserving to the granting company the beneficial ownership. We respectfully urge that no such conclusion can be legitimately drawn, either from the resolution itself or the recitations which precede it. Neither this resolution nor any other passed at this meeting authorized a transfer of the legal title to the terminal property, except in so far as that legal title stood in the name of the Des Moines & St. Louis Railroad Company. So far as the remainder of the property was concerned, it only authorized the transfer of the beneficial interest. If the theory adopted by the court is right, why did this resolution authorize the transfer of all possible interest which the Des Moines & St. Louis Company had in the terminal property, instead of authorizing the transfer simply of the legal title of that portion of the property which stood in its name? This query can not be answered by saying that this was done in order to give third parties to understand that the Terminal Company was the absolute owner of the property, because this record was not a public record and did not enter into the chain of title of which third parties must take notice.

What we claim for this resolution is emphasized by the following resolution enacted at the same time:

> "Resolved, That the proper officers of the company be authorized to transfer the management

and operation of its property in Des Moines so far as the same may now be vested in the company on the first day of January or as soon thereafter as practicable leaving the question of settlement between this company and the Des Moines Union Railway Company as authorized under the resolution for that purpose heretofore this day adopted to be arranged as directed therein." (Vol. II, p. 432.)

Resolutions in almost identically the same language were adopted by the St. Louis, Des Moines & Northern and the Des Moines Northwestern Railway Companies. Separate consideration need not be given to them except to observe that none of this property stood in the name of the Des Moines Northwestern Company, and so far as it was concerned, the only subject to which its resolution could refer was the beneficial interest it owned under the contract of 1882.

On the same day the Terminal Company passed resolutions accepting each of these two separate propositions, a record of which will be found on page 433 of Volume II. These resolutions demonstrate that these parties were dealing with respect to this property in good faith, as vendor and purchaser, and that the amount which the Terminal Company was to pay for this property was a subject for negotiation in which it was interested, which could not have been true if it was simply intended that it should be a trustee and a mere agency for the Railway Companies.

It is significant that in none of the resolutions passed in 1885 was any attempt made to authorize How and Dodge, trustees, to transfer to the Terminal Company the titles which they held in trust, which was the only thing necessary to be done, so far as the property which stood in their name was concerned, if it was

intended that the Terminal Company should hold the property in trust. On the contrary, the resolutions are carefully framed, to the end that a transfer of the beneficial ownership of the property should be authorized, the legal title so far as these resolutions are concerned remaining in How and Dodge.

The resolutions of 1887, with the single exception which we will hereafter note, were confined to authorizing How and Dodge, as trustees, to transfer the title held by them to the Terminal Company, a step necessary to be taken before the Terminal Company could be vested with the title to the property, whether in trust or absolute. These resolutions are entitled to no weight in determining the question at issue, because what was done here was the natural thing to have done, irrespective of the character of the title which the Terminal Company was to receive, except that it is significant that in these resolutions they were careful to fix, as one of the conditions upon which the trustees should transfer the title to the Terminal Company, that the latter should execute to them written assurances that it would pay the purchase price as agreed—something which was entirely unnecessary if the Terminal Company was a mere trustee and an agency of the Railway Companies.

In addition to the resolutions authorizing How and Dodge, as trustees, to transfer, the Des Moines & St. Louis Company passed a resolution the material part of which is as follows:

> "Resolved, That the president and secretary of this Company, be and they are hereby authorized and directed to execute to the Des Moines Union Railway Company a deed conveying to it all its real estate rights of way, franchise, road bed and other property of said company lying and being in

> the City of Des Moines, east of Farnham street, whether the same was acquired by grant from city of Des Moines or by purchase or condemnation, this resolution being offered for the purpose of carrying out the contract of date January second, 1882, * * * " (Vol. II, p. 439.)

If we consider this resolution by itself, it would not be entirely clear what was meant. It will be noted that it authorizes the transfer of all the "real estate rights of way, franchise, road bed and other property of said company lying and being in the City of Des Moines," which would indicate that it was the purpose to give to the Terminal Company an absolute title, because if it was intended to simply give the Terminal Company the legal title of the property in trust, it was only necessary for the Des Moines & St. Louis Company to transfer the title of that portion of the property which stood in its name. However, it says the resolution is offered for the purpose of carrying out the contract of January 2, 1882. This, of course, does not mean that it was for the purpose of carrying out the contract of 1882 in its literal terms, because, as the court has held, the plans as evidenced by this contract had been changed, and it therefore means, in accordance with that contract as changed by their modified plans.

However, when we come to consider what Mr. How, who offered this resolution, and Colonel Blodgett, who was present at the meeting at which it passed and who no doubt drew it, or at least approved it, immediately did in carrying out its purpose, the meaning of the resolution is perfectly clear, and this brings us to a consideration of

THE DEEDS TRANSFERRING THE PROPERTY TO THE TERMINAL COMPANY.

To our minds, these deeds, and especially the deed of the Des Moines & St. Louis Company, are the most persuasive items of evidence in this case. The latter deed was prepared by Colonel Blodgett, who, as we have said, was the lawyer whose duty it was to formulate the documents by which the parties were to carry out their intention. It was executed by James F. How, president of the Des Moines & St. Louis Company, and vice-president of the Wabash Company, who had for years been the active man, not only in the Terminal matter, but in all of the larger matters of the Wabash Company. Both of these gentlemen knew what the intention was. It was executed by the corporation which the court says intended thereby to retain the beneficial ownership of the property. While the form of the deed was a very proper one if executed by a third party for the purpose of conveying property to a trustee, it must be remembered that this deed was executed by the party whose successor claims to be the beneficiary of the alleged trust.

The deed, in form, is a warranty deed, and after describing that portion of the terminal property standing in the name of the grantor, reads as follows:

> "And all of the real estate within the City of Des Moines, Iowa, which is the property of the grantor, together with all real estate which may hereafter be acquired by this grantor either by condemnation proceedings or otherwise. Also all its embankments, bridges, turnouts, side-tracks, buildings and structures, water tanks and fixtures, shops, engine and other houses, depots, turntables and all its railroad property acquired and to be acquired, and everything appurtenant to said railroad, and all franchises and rights it may have

> acquired by grant, donation, purchase or otherwise, and particularly all rights, franchises and privileges granted by the City of Des Moines, Iowa, under an ordinance "granting the right of way to the Des Moines and St. Louis Railroad Company and its assigns, over, across, along and upon certain streets and alleys in the City of Des Moines, Iowa, and the right to bridge the Des Moines River on the south alley in said City between Court avenue and Vine streets.' And the said Des Moines and St. Louis Railroad Company *hereby covenants to Warrant and Defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it.*" (Vol. II, p. 458.)

The deed of the St. Louis, Des Moines & Northern Company is no less significant. After describing the property standing in its name it says:

> "Together with all and singular the tenements, hereditaments and appurtenances thereunto belonging, or in any wise appertaining, and the reversion and reversions, remainder and remainders, rents, issues and profits thereof. And also, all the estate, right, title interest in the above described property, possession claim and demand whatsoever, as well in law as in equity of the said parties of the first part, of, in or to the above described premises, and every part and parcel thereof, with the appurtenances. To Have and to Hold all and singular the above mentioned and described premises together with the appurtenances, unto the said parties of the second part and assigns forever." (Vol. II, p. 456.)

This latter deed was prepared, or at least approved, by Colonel Blodgett, and therefore contains language to express what he intended by the transaction.

Notwithstanding all these things, the court says—at least inferentially—that when the Des Moines & St.

Louis Company said that it sold and conveyed to the Des Moines Union Railway Company all its real estate within the City of Des Moines, Iowa, and all its railroad property of every kind and character, it didn't intend to do it and didn't in fact do it, but on the contrary it retained the ownership of all this property which it so carefully described in this deed, and, further, when the Des Moines & St. Louis Railroad Company covenanted "to warrant and defend the said premises against all the lawful claims of all persons whomsoever, claiming by, through or under it," it didn't make any such covenants—that what it in fact did by this language was to reserve unto itself and those claiming by, through or under it the beneficial ownership of this property.

The court in its opinion further says, inferentially, that when the St. Louis, Des Moines & Northern Company in its deed asserted that it thereby conveyed all the property specifically described "and the reversion and reversions, remainder and remainders, rents, issues and profits thereof," it didn't do anything of the kind, but it thereby retained to itself the rents, issues and profits thereof, together with the reversion, reversions and remainder; and also, when this company asserted that it thereby conveyed "all the estate, right, title, interest * * * as well in law as in equity," that it didn't do anything of the kind—that in equity it retained the ownership of this property as well as the rents, issues and profits thereof; and also, when it covenanted in said deed that the grantee should have and hold all of said property and all interest therein for itself and its assigns forever, it didn't do anything of the kind—it retained to itself not only the owner-

ship of the property but the right to recover the same at any time it saw fit.

Frankly, competent lawyers don't do business this way. The parties who were instrumental in the execution of these deeds were of mature age and sound mind, and were among the most experienced and skillful lawyers and business men of their period; they were honest and they knew how to formulate the English language to express their intention.

What possible reason could Colonel Blodgett and James F. How have had for formulating these deeds in this way had it been their intention to retain to the grantors the beneficial ownership?

We have already demonstrated that it could not have been for the purpose of making the trust effective, because for that purpose it was only necessary to transfer the legal title: nor would it help the Terminal Company to obtain credit, as being the absolute owner, from "outside parties," because the evidence of the trust, if any there was, was to be found in the articles, of which "outside parties" were charged with notice."

But this explanation is unwarranted for another reason. If the Terminal Company took this property charged with a trust, one of the conditions of the trust was that it should maintain and operate the property. It was only for the purpose of discharging these functions that it was required to have credit with "outside parties." For any such purposes they had the power to charge the trust property. Therefore it was unnecessary to make it appear to "outside parties" that the corporation had a good title to the property.

There is no possible explanation of these deeds, except that Colonel Blodgett, James F. How, General Dodge and the others having to do with the transac-

tions intended that the Terminal Company should receive an absolute conveyance of the Terminal property —become the absolute owners of it—and this was the interpretation they gave to the provision of the articles and the resolutions of 1885 and 1887. We contend that these deeds from the beneficiaries of the alleged trust are conclusive unless some reasonable explanation of them is given consistent with the trust theory, which has not been done.

THE CONTRACT OF 1889.

With respect to this contract the Court say:

> "The agreement of May 10, 1889, between the Terminal Company of the first part and the three proprietary companies of the second part fixed the terms upon which the property should be managed and the terminal service performed for a period of thirty years to date from May 1, 1888. It constituted a working arrangement for that period, but did not in terms or by implication set aside the trust or place a time limit upon it."

While it is true that this contract does not purport to, and indeed could not, change the terms of the trust, if one existed, yet this does not destroy or impair its probative value as bearing upon what was intended by the parties as the result of the transactions theretofore completed by which the title to the terminal property was vested in the Terminal Company when we come to consider the language in the contract and the circumstances under which it was made.

It was drawn by Colonel Blodgett and executed in behalf of some of the parties by James F. How and General Dodge. These persons knew what was intended by the previous transactions because they were

the persons who consummated them. Their intentions were the intentions of the corporations.

It has been the contention of counsel for the Railway Companies (apparently concurred in by the Court) that this contract was supplemental to the contract of 1882, and the occasion for its execution a desire to change in some few particulars the terms of that contract. This theory is supported by the testimony of Colonel Blodgett given many years after the transaction and after he had evidently compared the two contracts and ascertained in what particulars they differ. He says that the reasons for making this contract were:

> 1. That the agreement of 1882 made no provision for payment of interest or how the interest charge should be distributed among the railway companies;
>
> 2. That it did not obligate the Railway Companies to use the terminal; and
>
> 3. It was desired to apportion the expense of operating the roundhouses upon a different basis from that provided in that contract. (Vol. II, p. 366.)

When we come to examine the contract we find that Colonel Blodgett was careful to state therein the reasons for its execution, but we do not find among those reasons the ones he stated in his testimony many years after.

The reasons stated in the contract are as follows:

> "Whereas, the said party of the first part (the Terminal Company) is the *owner* of valuable terminal facilities in the City of Des Moines, Iowa, as hereinafter described; and
>
> Whereas, the respective parties of the second part have railroads in the State of Iowa which terminate at, or run into and through said City

of Des Moines, and in order to prevent unnecessary expense, inconvenience and loss attending the accumulation of a number of stations, and in order to facilitate the public convenience and safety, it has become important that said second parties *should have the use of the terminal facilities of said first party;* and

Whereas, said party of the first part has become incorporated and organized under the laws of the State of Iowa for the purpose of *owning* and operating a line of railway in the said City of Des Moines, Iowa, extending from the eastern boundary line of said City to Farnham Street, in the western part thereof; and

Whereas, said party of the first part, in pursuance of said charter has acquired and now *owns* a railway in said City, as above set forth, and has already acquired or constructed a large number of valuable main and side tracks, depots, depot grounds, lands, yards, shops, roundhouses, freight houses and other terminal facilities, and intends to acquire and construct more; and

Whereas, said second parties *are each desirous of having the right to use* said terminals in connection with their respective railroads; * * * "
(Vol. II, p. 479.)

According to the opinion of the court, when Colonel Blodgett drew, and Mr. How and General Dodge signed, this contract and said that the Terminal Company was the owner of this property, they meant it was owned by the Railway Companies; and when they said that it was important for the Railway Companies to secure the right to use the terminal facilities, they meant that the Railway Companies were the beneficial owners of the terminal facilities and had the right to use them irrespective of any contract; and when they said that the Terminal Company was organized for the purpose of owning the terminal property, they meant it was organized for the purpose of holding its

legal title in trust; and when they said that the Railway Companies were desirous of having the right to use these terminals in connection with their respective railroads, they meant that they owned them and already had the right to use them.

Why did Colonel Blodgett write, and Mr. How and General Dodge sign, these erroneous statements? What purpose had they to accomplish by it? This was a private contract between the parties which was not intended for record and was not so executed that it could be recorded, and therefore was not so drawn for the purpose of deceiving anybody. The language is unambiguous and is not possible of any construction other than that these persons thought that the Terminal Company owned this property. To say that this contract does not correctly and truthfully set out the relations of the Terminal Company to this property as the same was understood by these persons is to convict them of incompetency. We repeat that competent and honest men do not do business this way. While they may inadvertently execute a contract that is susceptible of more than one construction, they do not say one thing and mean something entirely to the contrary.

The opinion refers to some other provisions of this contract relating to the issue and division of the stock; restricting the transfer and sale thereof. These provisions were all perfectly consistent with the theory of ownership of the property by the Terminal Company. These parties being the owners of this stock, it was competent for them to contract between themselves as to its disposition—something entirely unnecessary under the trust theory. These provisions

not only do not furnish evidence of a trust, but are inconsistent therewith.

THE AMENDMENTS OF 1890.

For our purpose the question of the legal effect of these amendments may be ignored. Whatever their effect, no one reading the record can be in doubt as to what it was intended to accomplish by them.

The proceedings leading up to and incident to their adoption were formulated by Senator Cummins. He was and is an able and conscientious lawyer. He was not concerned in the transactions leading up to a transfer of the property nor in the execution of the contract of 1889. His knowledge with respect to the matter was gained from an examination of the record of those transactions and information given him by those who took part in them, all of whom he knew and with all of whom he talked. That Senator Cummins in good faith believed that it was intended by these transactions to vest a good title in the Terminal Company is beyond doubt. That he was in as good a position as anybody could be to know what the intention was is beyond question. An examination of the record disclosed to him that some ambiguities were contained therein. The purpose of the proceedings had on April 8, 1890, was to clear up those ambiguities and make manifest the agreed purpose of the parties in vesting the title. That all the parties interested were advised of this purpose is also beyond question. That Senator Cummins relied upon the good faith of those representing the Railway Companies and failed to appreciate that some day some representative of those companies who was not personally concerned in

the transactions might raise the question, and therefore failed to secure the formal action of the boards of directors of the Railway Companies, is our misfortune. But his failure to do so does not in any way weaken the value of this testimony as bearing upon the intent.

It will be remembered that the proceedings of April 8, 1890, were not hurriedly taken. They had been under consideration and discussion since the annual meeting of January 3, 1890. The amendments were presented at a meeting of the stockholders held on February 18, and the meeting adjourned to April 8, to give further time for consideration.

Why, in the amendment to article two, was the clause relied upon by this Court—"All the powers exercised by this company shall be in accordance with the terms and spirit of the aforesaid contract entered into on the 2nd day of January, A. D. 1882,"—stricken out? Was it not to make clear the purpose of the parties with respect to the title to this property?

Why were articles three and four amended so as to put it beyond question that this corporation should transact its corporate affairs as an ordinary corporation? Was it not for the same purpose?

Why was it provided in article fifteen that certain preambles, including the contract of 1882, should be repealed, stricken out and expunged? Was it not to remove any doubt as to the purposes of the parties?

And why, after amending these articles, did they recite in a resolution:

> "Whereas, the Articles of Incorporation have been amended so as to conform to the true intent of the several parties," etc. (Vol. II, p. 496.)

Can there be any doubt that the people who were present and took part in these transactions thought they were conforming to the true intent of the several parties by putting the title to this property beyond any question?

If these transactions had been formulated and carried out by persons who were not active in the organization of the terminal property and the transfer of the property to it, and were therefore not in a position to know absolutely the intent with which it was done, this evidence would lose much of its weight. But we find the active man at this meeting to be James F. How, who was the most active man in all the prior proceedings, and who, beyond question, knew the intent thereof, because his intent was the intent of the parties. Another active man was Charles M. Hays, who had been connected with a portion of the prior proceedings. They were concurred in by Colonel Blodgett, who signed the amended articles and caused them to be published to the world. These people were not attempting to perpetrate a fraud upon the corporations which they represented, but were attempting in good faith to express by formal record the intention with which the transactions then under consideration were had.

Obviously there was not intended by these amended articles of incorporation any change in the relative rights of the terminal company and the railroad companies in and to the terminal property; and the amendments were designed only to express more clearly what was intended by what had been previously done, and that was that the agreement of 1882 had been carried out fully, although in somewhat changed terms, by the incorporation of the terminal company, the con-

veyance of the property to it and the distribution of its stock to the railroad companies in the measure of their original interest in that property.

THE ATTITUDE OF THE OTHER RESPONSIBLE OFFICERS AND DIRECTORS OF THE RAILWAY COMPANIES.

We know, of course, that while James F. How and Colonel Blodgett were the active men in attempting to carry out the purposes of the Wabash Company, back of them were the directors and other responsible officers of that corporation. These persons were James F. Joy, O. D. Ashley, Edgar T. Welles and Thomas H. Hubbard, officers and directors of the Wabash Company and members of the Purchasing Committee. An examination of their record makes their intent equally clear. The fifth paragraph of the supplemental contract between Polk and Hubbell and the Purchasing Committee relating to the sale of the Fonda line (Vol. IV, p. 1576) cannot be explained on any theory other than that the Terminal Company was to have a good title to the property because an undivided interest in the terminal property itself and a proportionate share of the stock of the company acquiring the property were dealt with as exact equivalents.

The proposition of the Purchasing Committee of February 5, 1890 (Vol. IV, p. 1599), and the contract of February 11, 1890 (Vol. IV, p. 1601), made in pursuance of the proposition of February 5, and the contract of June 15, 1890 (Vol. IV, p. 1613), by which the Purchasing Committee undertook to sell to the Hubbells a portion of the stock of the Terminal Company, can only be explained upon the theory that the Purchasing Committee were either attempting to defraud

the Hubbells by selling them something of no value, or that they understood that this stock represented a valuable interest in the terminal property.

This court, of course, cannot base its decree upon the theory that the responsible representatives of complainants' predecessors were attempting to defraud, and thereby put its seal of approval upon a fraudulent transaction. With respect to this sale the court says:

> "We deem it clear, however, that the intent of the purchasing committee, known and assented to by Hubbell and Dodge at the time, was merely to enable the latter to sell the three-eighths interest to some railroad company capable of participating in the use of the terminal."

If this comment had been made with respect to the stock contracted for by Polk and Hubbell on September 10, 1887 (Vol. IV, p. 1575-6), there would be no answer to it, because it appears from that transaction that the stock was acquired for the Northwestern Company, for it was agreed that it should at once be pledged for the indebtedness of that company. But as applied to the transactions under consideration, the conclusion cannot be justified by the record for the following reasons:

First: Because so far as the two northern lines were concerned, each held one-fourth of the stock in the terminal company and, under the trust theory, were the beneficial owners of the property itself. Additional stock would have been of no value to them. There could have been no inducement for Dodge and Hubbell to invest their money in this stock if it represented nothing of value, and this the Purchasing Committee knew as well as the purchasers.

SECOND: Nor was a sale to some other line of railroad through Hubbell and Dodge as conduits contemplated. Why should they buy the stock and tie up their money in it if they could by no possibility profit by the transaction and might lose their money altogether if no such railroad company should appear.

But let us suppose that such a company did appear and did buy this stock of Hubbell and Dodge. What would that company get by its purchase? Just what Hubbell and Dodge got by theirs. It could not get more, for it would, equally with Hubbell and Dodge, be charged with notice of the agreement of 1882 and the provisions of the articles of incorporation. The quality of the stock would be the same as to each. It could not signify one thing as to one party and another thing as to the other party. And so if there was no intent to convey anything of value to Hubbell and Dodge, then a fraud was intended upon the contemplated purchasing railroad company.

We wish to emphasize that the fundamental error of the Court's opinion is that the agreement of 1882 and the articles of incorporation meant something different to Hubbell and Dodge from what they meant to outside parties. But this cannot be unless there was some other instrument or some other transaction connected with them in some way impressing upon them a significance for Hubbell and Dodge different from that apparent upon their face and with which outside parties could not be charged. But nothing of that sort appears in the record. Every resolution, every deed of conveyance is to the effect that it was intended to convey the entire right and title in the terminal property to the terminal company.

THIRD: The contract of February 11, 1899, contained the following provision:

> "And said Committee hereby authorizes and empowers said Des Moines Union Railway Company, or the proper officers thereof, to issue to said *Hubbell* or his assigns, one-eighth of all the capital stock in the said Des Moines Union Railway Company." (Vol. IV, p. 1601.)

FOURTH: Coincident with the execution of this contract the Purchasing Committee agreed that they would consent to an amendment to the articles which would permit one director of the company to be nominated by any *person* holding one-eighth of the stock of the company. (Vol. IV, pp. 1601-2.)

From these instruments it is clear that the Purchasing Committee, the members of which, as we have said, were also officers and directors of the Wabash Company, understood, not as the court has said, that this stock should be transferred to some railway company, but that it might be held by Hubbell or any other individual, and that the ownership of said stock would give to such owner a voice in the management of the property. These acts of these individuals, if we give them credit for being ordinarily honest, could be predicated only upon their understanding that the Terminal Company owned the property.

In this connection the Court says:

> "In correspondence between Mr. Hubbell and the Purchasing Committee antecedent to this transaction, they warned him that it would be necessary 'to confine a sale of the stock to such railway companies as would be interested in the station,' and he assented to this, acknowledging that 'it would be prejudicial to sell any of this to outsiders, and I understand it as you do that the

> stock can not be sold without the consent of the different railroad companies who now form the terminal company.' "

The correspondence to which the Court refers is found on pages 1059-1061 of Vol. III of the record. Mr. Ashley says, indeed, that he "always supposed it would be necessary to confine the sale to such railroad companies as would be interested in the station," but nothing in the articles of incorporation so confines it. It would be to the advantage of the Terminal Company to sell to such a purchaser, as that would mean a greater use of the terminal facilities. This correspondence occurred in June, 1888.

On May 10, 1889, the railway companies and the Terminal Company executed their operating contract. In this it was provided (Rec., Vol. II, p. 487) that the shares of the Terminal Company

> "are not transferable in whole or in part, without the consent in writing of all the parties of the second part (the railway companies) to this agreement."

With such consent they were, of course, transferable.

Almost a year expired after this before the proposal by Mr. Ashley to sell some of this stock was made. It was an independent transaction. It had no relation to the sales suggested in 1888. The right to sell with the consent of all the railway companies to any purchaser had been provided for. The negotiations for the sale to Hubbell and Dodge were with Hubbell individually. The memorandum contracts for the sale were made with him individually. And the sale included bonds of the Terminal Company as well as stock. The terms of the agreement were the same as

to bonds and stock. The preliminary correspondence is found in Vol. III, pages 1061-1063, and the memorandum contracts, Vol. IV, pages 1599-1602 and page 1613. It is conceded that the sale of the bonds was to Hubbell individually and absolutely, and there is no reason for the assumption that the sale of the stock was in any wise different.

The Court, however, holds that the sale of the stock was not absolute, but with the purpose and, in effect, upon the condition, that it should be resold "to some railroad company capable of participating in the use of the terminal."

But even from this view of the transaction it does not follow that the title of the Terminal Company to the terminal property was that of a naked trustee and that the holders of the shares had not the usual indirect and substantial interest in the property itself.

This anticipated railroad company would acquire an interest in the Terminal Company and the terminal property like in kind to that held by the other proprietary companies and to the extent measured by its shares. That beneficial interest in the property had great value, reflected, among other things, in what were called surplus earnings, derived in part from other than railroad uses of the property.

It is a fair inference from the Court's opinion that if Hubbell had sold to a railroad company which would make use of the terminal facilities, that railroad company would not simply have acceded to a naked trusteeship, but would have acquired something of substantial value and this it would have gotten from Hubbell.

After thirty years this value, with the increment

the years have brought, is taken from the Hubbells and given to the Wabash, which sold it, and to the Milwaukee, which never bought it. Something more than the purchase price of this stock, paid at a time when the outlook of the enterprise was most dubious, should be awarded upon the cancellation of the stock at this time.

Respectfully submitted,

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Attorneys and of Counsel for Respondents in No. 66 and Petitioners in No. 67.

CERTIFICATE OF COUNSEL.

The undersigned attorneys and of counsel for the Des Moines Union Railway Company, F. M. Hubbell, F. C. Hubbell and F. M. Hubbell & Son, respondents in No. 66 and petitioners in No. 67, hereby certify that the above and foregoing petition for rehearing is made in good faith and not for purposes of delay, and that in their opinion said petition is well founded in law.

JAMES L. PARRISH AND
FREDERICK W. LEHMANN,

Attorneys and of Counsel for Respondents in No. 66 and Petitioners in No. 67.